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The Center for Biological Diversity (“Center”) objects to Energy Commission Staff’s (“Staff”) filing of an improper “Memorandum” to the Carlsbad Siting Committee that is outside of both the bounds of the Commission’s procedures and the scheduling order in this proceeding. After the Committee held an additional evidentiary hearing on December 12, 2011 and authorized the filing of one post-evidentiary hearing brief of ten pages due January 10, 2012, the proceeding was ripe for a decision by the Committee. Literally out of nowhere and weeks later, Staff’s counsel filed a self-styled Memorandum to the Siting Committee entitled “Staff Responses to Comments Made by the Center for Biological Diversity Pertaining to Staff’s Greenhouse Gas Emissions Analysis for Carlsbad Energy Center Project (CECP) on February 2, 2012.” Staff’s “Memo” made it appear that it is common for Staff’s counsel to write unsolicited memoranda to the Siting Committee, but the Commission’s procedural rules require Staff to act as an independent party. (*See* 20 Cal. Code Regs §§ 1712.5.) Parties are not allowed to simply write memoranda to the Siting Committee. Parties file arguments pursuant to Committee scheduling orders or request permission by motion to make an initial filing. Staff did neither.

In addition to not following basic procedures, Staff failed to indicate that their “Memo” is actually an opposition brief that responds to arguments in the Center’s Comments on the Presiding Member’s Proposed Decision filed eight months ago on June 8th, 2011. Staff quoted passages from the Center’s Comments without attribution and then provided its argument in response.¹ Staff, similarly, failed to provide specific cites to support its characterization of the record. Staff’s “Memo” also raised legal authorities to which it had not previously cited and introduced a new document to the record. In addition, Staff made new arguments about evidence presented at the recent evidentiary hearing.

¹ *See, e.g.*, Staff’s Memo, p. 1 (quoting the Center’s PMPD Comments, p. 1).

Given the unprecedented nature of this filing, the Center is surprised that the Committee did not *sua sponte* reject the filing as improper. The “Memo” raises obvious questions about whether the Committee or the hearing officer informally requested a memo about the greenhouse gas issues without proper notification to the parties. No matter what occurred, the Center vigorously objects to this memo.

Unfortunately, the genie is already out of the bottle. The Center must assume that the Committee has read this document. Additionally, the “Memo” is already posted on the Commission’s website. The Center appreciates the fact that at this late date in the proceeding Staff has finally taken the Center’s greenhouse gas arguments seriously. However, given the substantial, twelve-page, single-spaced brief that Staff filed, the Center needs time to address the issues raised. The Center will file a reply brief on March 8, 2012. As a matter of fairness, the Center urges the Committee to delay any decision until the Center files its brief addressing the substance of Staff’s improper filing.

DATED: February 7, 2012

A handwritten signature in black ink, appearing to read "William Rostov", with a long horizontal flourish extending to the right.

William B. Rostov
Earthjustice
Attorney for Center for Biological Diversity



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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**APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT**

**Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 11/29/2011)**

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DECLARATION OF SERVICE

I, Jessie Baird, declare that on February 7, 2012, I served and filed copies of the attached CENTER FOR BIOLOGICAL DIVERSITY'S OBJECTION TO STAFF'S IMPROPER FILING. The original document, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [www.energy.ca.gov/sitingcases/carlsbad/index.html].

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(Check all that Apply)

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- ☒ Served electronically to all e-mail addresses on the Proof of Service list;
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AND

For filing with the Docket Unit at the Energy Commission:

- ☒ by sending an original paper copy and one electronic copy, mailed with the U.S. Postal Service with first class postage thereon fully prepaid and e-mailed respectively, to the address below (preferred method); **OR**
- ☐ by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

CALIFORNIA ENERGY COMMISSION – DOCKET UNIT

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1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

- ☐ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

California Energy Commission
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.



Jessie Baird